Supreme Court, U.S.
FILED

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No. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SHAWN ANTHONY SEVERA,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari

To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. CONNORS III
Counsel of Record
Texas Bar No. 04705400
605 E. Violet, Suite 3
McAllen, TX 78502-5838
(210) 687-8217
(210) 687-8230 FAX

ATTORNEY FOR PETITIONER

February 13, 1997

CERT5:SAS2

32 pp

QUESTIONS PRESENTED

1. Did the Court of Appeals violate Petitioner's constitutional rights to due process and a fair trial by affirming a 132 month sentence and a felony conviction where the jury's verdict, as a matter of law, found Severa guilty only of "TRANSPORTING MARIHUANA", a misdemeanor with a maximum sentence of 12 months?

2. Did the Court of Appeals violate Petitioner's constitutional rights to due process and a fair trial on the grand jury's indictment by affirming a felony conviction where the jury's verdict, as a matter of law, constituted the plain error of a fatal constructive amendment to the indicted offense and variance from that necessary for conviction under the district court's instructions?

PARTIES BELOW

This case's caption contains all parties' names to the proceedings in the court below of whose judgment review is sought.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SHAWN ANTHONY SEVERA, Petitioner

vs.

THE UNITED STATES OF AMERICA, Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT:

Petitioner, Shawn Anthony Severa (Severa), respectfully petitions the Court to issue a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINION AND ORDERS BELOW

The unpublished opinion of the Court of Appeals is copied in the Appendix at 1-6. The unpublished judgment of the U.S. district court is copied in the Appendix at 9-21.

JURISDICTION

The Court of Appeals issued its opinion on October 8, 1996. On November 15, 1996, the Court of Appeals denied as a petition for panel rehearing Severa's timely suggestion for rehearing in banc. That appellate rehearing order is copied in the Appendix at 7-8. Thus, this petition was timely filed on February 13, 1997. See Supreme Court Rule 13. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment in part reads:

> No person shall be held to answer for a capital, or

> otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ... nor shall any person be ... deprived of life, liberty, or property, without due process of law ....

The Sixth Amendment in part reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ... and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

In the southern district of Texas's Laredo division, the U.S. district court had jurisdiction under 18 U.S.C. 3231 because on June 5, 1995, Severa was indicted on three counts for offenses against federal laws. On August 22, 1995, a superseding indictment (Appendix at 22-24) was returned in criminal case no. L-95-115-S, charging Severa with conspiracy in violation of 21 U.S.C. 846, 841(a)(1) and 841(b)(1)(B) (count one); aiding and

abetting possession with intent to distribute over 100 kilograms, that is, 2115.25 pounds (gross weight), of marihuana in violation of 21 U.S.C. 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. 2 (count two); and knowingly carrying a firearm during and in relation to a drug-trafficking crime in violation of 18 U.S.C. 924(c)(1) (count three).

On August 23, 1995, a jury trial commenced after the district court granted the government's motion to dismiss count one of the superseding indictment. On August 25, 1995, the jury found Severa not guilty as to count three and as to count two, the jury's written verdict (Appendix at 25) read, "GUILTY CHARGE #2 TRANSPORTING MARIHUANA".

On December 21, 1995, the district court (Kazen, J.) sentenced Severa to a term of 132 months in the custody of the

U.S. Bureau of Prisons and assessed a term of five years supervised release, a fine of $1,500 and a special assessment of $50 (Appendix 9-21).

In this criminal case, the district court entered its judgment on December 28, 1995 (Appendix at 9-21). On December 21, 1995, Severa timely filed notice of appeal of his judgment of conviction and sentence, thereby vesting the Court of Appeals with jurisdiction under 28 U.S.C. 1291 and 18 U.S.C. 3742.

REASONS FOR GRANTING PETITION

First, it was plain error for the district court to award Severa a 132 month sentence when 12 months is the maximum legislated sentence available after the jury's written verdict (Appendix at 25) found Severa "GUILTY CHARGE #2 TRANSPORTING MARIHUANA", a misdemeanor.

Second, it was plain error after judicial and prosecution prodding about "transporting marihuana", for the jury to constructively amend the indictment by its jury verdict which convicted on count two of "transporting marihuana" without finding that possession was with intent to distribute, an element necessary for conviction.

FACTS

This case involves the transportation of marihuana through the Border Patrol checkpoint on IH-35 approximately fifteen (15) miles north of Laredo, Texas (R. at 97-99). At the checkpoint, officers searched the trailer Severa had been driving and discovered marihuana secreted in the trailer's roof (R. at 103-105).

Severa was the owner of the tractor (R. at 241, 244), which had a paper plate registered to William Hodges of Houston,

Texas (R. at 167, 170). That trailer was one of several trailers sold to Sociedad de Produccion Rural del Soconosko, a Mexican company (R. at 249).

Severa was one of several drivers that had transported the trailers from Trail Mobile, Inc., in Dallas, Texas to Hidalgo, Texas before they were to be shipped later to a Mexican corporation (R. at 274-276, 282-283).

D.E.A. case agent Colin McNeese testified Severa had said he was hauling the trailer for William Hodges to Hockley, near Houston, Texas; and Severa could not make a controlled delivery that day (a Friday) because he was not scheduled to deliver the trailer until Monday (R. at 273, 464).

Severa testified. His business was an independent operation known as Scarlett Trucking Company (R. at 195-197). Larry

Flint hired him to haul the trailers (R. at 332-342, 303-355, 386). Severa did not know the trailer had marihuana in the roof; he did not speed away; and he did not pass any vehicles before he got stopped (R. at 345-346). At the checkpoint, he explained Mr. Flint had hired him for the trip (R. at 353-354, 422-423; see also 273, 465). Severa told the agent he would cooperate in the trailer's controlled delivery as scheduled the following Monday, but the agent refused (R. at 422-423). Severa denied he knowingly possessed the marihuana (R. at 345-346).

ARGUMENT

Plain error exists in Severa's felony conviction and sentencing to 132 months in custody pursuant to 21 U.S.C. 841(a)(1) and 841(b)(1)(B). Under the jury's verdict, Severa should have been sentenced

to no more than the legislative maximum of one year in custody for simple possession by transporting under 21 U.S.C. 844. The higher sentence was a denial of a substantial right, which was not called to the district court's attention.

Severa's jury found Severa guilty of an offense necessarily included in the offense charged, thus unwittingly exercising the purpose of Rule 31(c) of the Federal Rules of Criminal Procedure. "'The purpose of this protection is to prevent juries from improperly resolving their doubts in favor of conviction when one or more of the elements of the charged offense remain unproven, but the defendant seems plainly guilty of some offense.'" U.S. v. Harrison, 55 F.3d 163, 166 (CA5 1995).

Severa submits that jury's verdict finding guilt of "transporting marihuana"

(without intent to distribute), was a result of a constructive amendment of the superseding indictment and constituted a fatal variance with the superseding indictment's count two charge of possession with intent to distribute in violation of 21 U.S.C. 841(a)(1), and 841(b)(1)(B).

Stirone v. U.S., 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), held that at trial the charges contained in an indictment may not be broadened or altered through an implied or explicit amendment, except by the grand jury itself. Such constructive amendments, which are reversible error per se, occur when the jury is permitted to convict upon a factual basis different than an essential element of the offense charged. Id., at 217-218; U.S. v. Young, 730 F.2d 221, 223 (CA5 1984).

Although "possession of marihuana" is necessary to be able to transport that marihuana, "transporting marihuana" is not an offense to be found in the federal statutes.

U.S. v. Harrill, 877 F.2d 341, 344 (CA5 1989), held that a conviction based on an offense not charged in the indictment, including the enlargement of an indictment by instructions to the jury, breaches the Fifth Amendment guarantee of the U. S. Constitution that no one may be prosecuted for a felony except upon indictment by a grand jury.

In the present case the indictment was broadened, and a wrongful conviction allowed, by the prosecutor's consistent argument in opening and closing that Severa was charged with having transported the marihuana (R. at 81, l. 3-4; 517, l. 23-24). The district court also

contributed to the constructive amendment of the indictment by instructing the jury as follows:

> IT HAD A RELATIONSHIP TO COMMITTING A DRUG OFFENSE; THAT IT WAS THERE TO HELP PROTECT OR HELP MAKE SMOOTHER THE TRANSPORTATION OF NARCOTICS (R. at 545, l. 5-7). * * * * THE ONLY CHARGE AGAINST HIM, AT LEAST WITH RESPECT TO THE MARIJUANA, IS, DID HE KNOW... WHEN HE AGREED TO MOVE THE TRAILER FROM ONE POINT TO ANOTHER, DID HE KNOW THAT IN THAT TRAILER WAS AN ILLEGAL CARGO AND, THEREFORE, DID HE KNOWINGLY AGREE TO MOVE IT ON THE HIGHWAY WITH THE INTENT TO DELIVER IT TO SOMEBODY ELSE (R. at 547, l. 6- 12).

The ultimate proof on this issue is the fact that the jury's verdict found Severa guilty of "transporting marihuana" and not of possession with intent to distribute as charged in the indictment. By so finding, the jury in essence found Severa not guilty of count two as charged in the indictment and guilty of

"transporting marihuana", a lesser charge to that included in the indictment.

After jury deliberation, the district court received the jury's verdict and upon noticing that the phrase "GUILTY CHARGE # TWO TRANSPORTING MARIHUANA" had been written in by the jury foreman, asked only the foreman if he meant that as a finding of guilt in count two, to which the foreman replied "THAT'S CORRECT" (R. at 570, l. 10-17).

Thereafter all twelve jurors were polled individually each replying that it (the verdict as submitted) was their true and correct verdict. The jurors were then admonished and dismissed (R. at 571-575).

Severa's attorney, after the dismissal of the jury, asked to see the verdict form and questioned the validity of the verdict. The district court called for the jury, but not before one of

Severa's attorney had spoken with one of the jurors (R. at 576-578). Only eleven jurors appeared on the recall (R. at 580, l. 6) and the district court proceeded to poll the foreman. Mr. Cruz responded orally, and the other ten jurors responded by nodding (the court reporter assuming it was in the affirmative), that they discussed all the technical elements of possession with knowledge, of marihuana, with the intent to distribute (R. at 581).

Severa submits that the attempt by the district court to clarify the verdict was improper. A verdict is final if deliberations are over, the result is announced in open court, and the jury is polled and no dissent is registered. U.S. v. White, 972 F.2d 590 (CA5 1992).

The actions of the courtroom deputy clerk in file stamping the verdict form and docketing the verdict is immaterial to

the question of when a verdict is "recorded". When a poll is requested, the verdict becomes final and "recorded" when the twelfth juror's assent to that verdict is made on the record. U.S. v. Dakins, 872 F.2d 1061, 1065 (CA D.C. 1989). Where no poll is requested or taken, the verdict becomes final and unalterable and is "recorded" when the jury has dispersed, completing its discharge. U.S. v. Marineri, 32 F.3d 1209, 1213 (CA7 1994) The jury cannot further deliberate once the final verdict has been recorded. U.S. v. Straach, 987 F.2d 232, 242 (CA5 1993).

In the present case, the verdict of "GUILTY CHARGE # TWO TRANSPORTING MARIHUANA" had been recorded when, during polling, the 12th juror assented to that verdict. Invalid was the district court's subsequent attempt to resolve the ambiguity in the verdict by later

improperly re-polling only eleven jurors, after the court had first dispersed the jury and the jury had talked to other persons.

To allow Severa's conviction to stand on the re-polling of only eleven jurors after the verdict's recording constitutes a violation of Severa's fundamental right to a unanimous verdict. See U.S v. Moreno, 612 F.2d 483 (CA10 1979); U.S. v. Smedes, 760 F.2d 109 (CA6 1985); U.S. v. Essex, 734 F.2d 832 (CA D.C. 1984); and U.S. v. Ullch, 976 F.2d 509 (CA9 1992).

To question only the foreman, Severa submits was improper to clarify the ambiguity. Upon noticing the verdict was "at the very least ambiguous and/or a determination of guilt of a lesser offense and not guilty on the offense charged in count two," the proper procedure the district court should have followed was

not to question only the foreman as was done, but to instead permit the jury to resume deliberation and allow correction of its verdict before the re-reading of the verdict and final polling of the jury. See U.S. v. Mears, 614 F.2d 1175, 1179 (CA8 1980).

Severa also submits the unanimous jury's verdict of "GUILTY CHARGE # TWO TRANSPORTING MARIHUANA" cannot be treated as mere surplusage. Severa is aware of case law where additional comments on the verdict form have been treated as surplusage.

In U.S. v. Davis, 747 F.2d 440, 442 (CA8 1984), the comment "we the jury believe that Davis was used by the witnesses that testified against him", was treated as surplusage for it did not qualify the verdict or rendered it equivocal or ambiguous. Any uncertainty

as to the verdict was removed by the polling and each juror's response that Davis was guilty.

Cook v. U.S., 379 F.2d 966, 970 (CA5 1967), and cases cited therein, stand for the proposition that where the jury finds the defendant guilty as charged in the indictment and, without more, simply requests leniency, that request should be treated as surplusage. In Cook, however, the request for leniency was not a simple request but there was strong suggestion during the polling that there would have been no agreement as to the verdict unless the recommendation of leniency was also accepted. The effect of that recommendation, steadfastly adhered to during jury polling, was to nullify the verdict. In other words, there is no verdict as long as there is any uncertainty or contingency to the finality

of the jury's determination. Id., at 970.

Severa submits that his case can be distinguished from those in which the jury's comment was treated as surplusage. In Davis, supra, there was no uncertainty or contingency on the jury's determination of guilty on the offense charged in the indictment, and neither was the comment a condition on the finding of guilt as in Cook. In the present case however, the jury's comment "GUILTY CHARGE # TWO, TRANSPORTING MARIHUANA", renders the verdict vague, ambiguous, and uncertain in that transporting marihuana was not the offense charged and was a finding of guilty on a constructive amendment of the indictment invited by the prosecution and the district court. The polling of twelve jurors and subsequent re-polling of only eleven jurors did not resolve the ambiguity. The jury should have been

required to continue its deliberation before the verdict was officially recorded for the last time.

The jury's verdict and Severa's above reading of it should come as no surprise to either the government or the district court. Much of the juried trial of this case was about whether or not Severa knowingly transported marihuana. See examples below. In opening statement, the prosecutor said (R. at 517, l. 23-24): "HE'S JUST CHARGED WITH TRANSPORTING IT KNOWINGLY."

Without objection (R. at 555), the district court instructed the jury (R. at 533-534, l. 23-6, 19-22; 535, l. 21-25; 536, l. 14-24; 538, l. 16-24; 539, l. 23-224; 540, l. 9-10, 12-13; 545, l. 1-7; 547, l. 6-14):

> SO LET'S TALK ABOUT THE FIRST ONE, WHICH IS LABELED COUNT TWO. IT IS A CRIME TO KNOWINGLY AND INTENTIONALLY HAVE IN YOUR

POSSESSION CERTAIN CONTROLLED SUBSTANCES, AND MARIJUANA IS ONE OF THEM. I'LL INSTRUCT YOU THAT AS A MATTER OF LAW, MARIJUANA IS ONE OF THOSE SUBSTANCES WHICH COMES UNDER THIS PROVISION. IT IS A CRIME TO KNOWINGLY AND INTENTIONALLY BE IN POSSESSION OF MARIJUANA WITH THE INTENT TO TO DISTRIBUTE IT, AND THAT'S WHAT HE'S CHARGED WITH IN THIS COUNT NUMBER TWO. **** I MEAN, NOBODY IS DISPUTING THE EVIDENCE THAT, IN FACT, WHAT WAS IN THERE WAS MARIJUANA AND THERE IS NOT ANY REAL SERIOUS DISPUTE THAT THE GENTLEMAN WAS IN POSSESSION OF IT. **** SO THE IDEA HERE IS THAT YOU CAN FIND, UNDER THE LAW, THAT IF A GENTLEMAN IS THE SOLE OPERATOR AND INDEED THE OWNER OF THE TRUCK AND HE IS PULLING A TRACTOR AND IN THE TRACTOR IS MARIJUANA, THAT HE IS IN POSSESSION OF THE MARIJUANA. **** THERE'S TWO KINDS OF MARIJUANA VIOLATIONS. ONE IS WHAT WE CALL "SIMPLE POSSESSION", THAT YOU HAVE IT BUT YOUR INTENT IS SIMPLY TO TAKE IT HOME AND SMOKE IT. THAT'S WHAT'S CALLED "SIMPLE POSSESSION". THIS KIND OF POSSESSION, THAT HE'S CHARGED WITH, IS CALLED "AN INTENT TO DISTRIBUTE IT", AND THAT SIMPLY MEANS THAT THE GOVERNMENT IS ALLEGING THAT HE HAD THE INTENT NOT TO TAKE IT HOME TWO THOUSAND POUNDS FOR SMOKING IT BUT RATHER WAS INTENDING TO DISTRIBUTE IT. HE WAS INTENDING TO DELIVER IT

SOMEBODY ELSE. THAT'S ALL THAT MEANS. **** OF COURSE, THAT'S SOMETHING YOU CAN CONSIDER AS PART OF THE TOTAL PACKAGE, THAT HE WAS IN POSSESSION OF IT AND HE WAS THE DRIVER AND IT WAS HIS TRUCK AND SO FORTH, BUT THAT ALONE IS NOT ENOUGH. THE GOVERNMENT HAS TO GO BEYOND THAT AND SHOW THAT NOT ONLY WAS HE IN POSSESSION OF IT, BUT HE KNEW IT. AND THAT WHY ALL THE REST OF THIS INFORMATION, WHICH YOU MAY, AT TIMES, HAVE THOUGHT WAS STRANGE OR NOT STRANGE, BUT ALL THE REST OF THIS IS WHAT REALLY COMES DOWN TO IT. **** NOW, THE GOVERNMENT ONLY HAS TO PROVE THAT HE KNEW HE WAS CARRYING A CONTROLLED SUBSTANCE. **** IN FACT, THE POUNDAGE ITSELF IS NOT AN ELEMENT ... WAS THERE MARIJUANA AND WAS THERE A MEASURABLE AMOUNT. **** BUT THAT'S WHAT YOU HAVE TO DECIDE. IN OTHER WORDS, NOT ONLY WAS THERE A GUN THERE, NOT ONLY WAS HE CARRYING A GUN IN THE TRUCK AND NOT ONLY DID HE KNOW IT, BUT DID IT HAVE... DO YOU THINK IT PLAYED A PART IN... DO YOU THINK IT HAD A RELATIONSHIP TO COMMITTING A DRUG OFFENSE; THAT IT WAS THERE TO HELP PROTECT OR HELP MAKE SMOOTHER THE TRANSPORTATION OF NARCOTICS. **** SO THE ONLY CHARGE AGAINST HIM, AT LEAST WITH RESPECT TO THE MARIJUANA, IS, DID HE KNOW... WHEN HE AGREED TO MOVE THAT TRAILER FROM ONE POINT TO ANOTHER. DID HE KNOW THAT IN

> THAT TRAILER WAS AN ILLEGAL CARGO AND, THEREFORE, DID HE KNOWINGLY AGREE TO MOVE IT ON THE HIGHWAY WITH THE INTENT TO DELIVER IT TO SOMEBODY ELSE. SO YOU'RE NOT HERE TO JUDGE ANYBODY ELSE. ALL WE WANT IS YOUR VERDICT, EITHER WAY, AS YOU SEE FIT UNDER THESE INSTRUCTIONS AND UNDER THE EVIDENCE, ON THOSE TWO COUNTS FOR THIS DEFENDANT.

It is well settled that reversible error occurs when either the district court or the prosecution amend the grand jury's non- surplusage parts of the indictment during a trial. U.S. v. Doucet, 994 F.2d 169 (CA5 1993). After those various above described courtroom amendments so Severa was being also prosecuted herein for the lesser included offense of "knowing transportation of possessed marihuana, a controlled substance" in violation of 21 U.S.C. Sec. 844 (a), all this case's parties and the courts must accept the jury's compromised but rational verdict of "GUILTY CHARGE #2

TRANSPORTING MARIHUANA," rather than "guilty as charged" on Count 2 as suggested by the district court's verdict form and that court's other proper jury instructions (R. at 550, l. 11-19).

To support a simple possession conviction, the evidence must show knowing possession of a controlled substance. U.S. v. Steen, 55 F.3d 1022, 1030-1032 (CA5 1995). The district judge normally expressly instructs the jury that if it did not find defendant guilty of knowing possession with the intent to distribute, the jury could find guilt of the lesser included charge of simple possession. See U.S. v. Onick, 889 F.2d 1425, 1430-1433 (CA5 1989); U.S. v. Deisch, 20 F.2d 139 (CA5 1994).

CONCLUSION

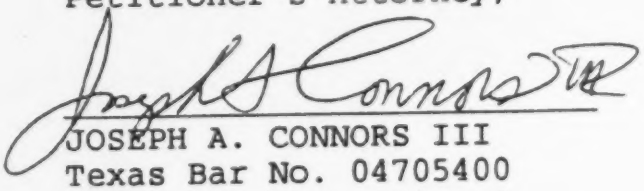
For the foregoing reasons, the Supreme Court should find plain error(s)

below which require the reversal of all judgments below and the remand of the cause to the district court for resentencing of Severa to no more than the one year statutory maximum under 21 U.S.C. Sec. 844 (a).

PRAYER

Severa prays a writ of certiorari issue.

Respectfully submitted by
Petitioner's Attorney,



JOSEPH A. CONNORS III
Texas Bar No. 04705400
605 E. Violet, Suite 3
McAllen, Texas 78502-5838
(210) 687-8217
(210) 687-8230 FAX

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JOSEPH A. CONNORS III
Counsel of Record
Texas Bar No. 04705400
605 E. Violet, Suite 3
McAllen, TX 78502-5838
(210) 687-8217
(210) 687-8230 FAX

ATTORNEY FOR PETITIONER

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 96-40032

Summary Calendar

UNITED STATES OF AMERICA

Plaintiff-Appellee,

versus

SHAWN ANTHONY SEVERA

Defendant-Appellant.

Appeal from the
United States District Court
For the Southern District of Texas
USDC No. L-95-115

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Shawn Anthony Severa appeals his conviction and sentence for possessing marijuana with intent to distribute it, 21 U.S.C. § 841(a)(1). Contrary to his contention, the evidence was amply sufficient for a jury to convict. United States v. Lopez, 74 F.3d 575 (5th Cir.), cert. denied, 116 S.Ct. 1867 (1996). Among other things, the defendant was caught with $1.7 million worth of marijuana secreted in his truck, and demonstrated no surprise when it was found. United States v. Del Aguila-Reyes, 722 F.2d 155, 157 (5th Cir. 1983). When arrested, he was carrying a semi-automatic pistol and almost $2,000 in cash. United States v. Romero-Reyna, 867 F.2d 834, 836 (5th Cir. 1989). Severa said that he inspected the trailer and did not smell anything even though four agents testified that the odor coming from the trailer was

very strong. Severa had in his cab tools that would quickly and easily dismantle the compartment behind which the drugs were hidden. The jury heard testimony about false license plates and bills of sale for different trailers that were also in the truck. Severa gave a false account to border agents about his involvement with the trailer, an account that clashed with evidence the jury heard at trial. The jury was free to disbelieve Severa. A rational jury had sufficient evidence to convict Severa. United States v. Diaz-Carreon, 915 F.2d 951 (5th Cir. 1990); United States v. Anchondo-Sandoval, 910 F.2d 1234 (5th Cir. 1990).

We also find no plain error in (1) what Severa alleged to be constructive amendment of the indictment; (2) Severa's not being sentenced for simple possession of marijuana; (3) the district court's

curtailment of his cross-examination of two witnesses; (4) what Severa alleged to be prosecutorial misconduct; and (5) the modified Allen charge given to the jury. See United States v. Calverly, 37 F.3d 160, 162 (5th Cir. 1994) (en banc), cert. denied, 115 S.Ct. 1266 (1995). We comment briefly about appellant's contentions of constructive amendment and the Allen charge.

The record shows that both the prosecutor and the defense counsel correctly informed the jury that the Government had to prove beyond a reasonable doubt that Severa possessed the drugs with intent to distribute. The court expounded forcefully on the knowledge element. In open court, the judge asked the foreman of the jury about the handwritten portion of the jury forms, and then polled the jury. The jury

members confirmed that they voted to convict Severa on the count in charge two. The court asked the jurors whether they all understood the elements of count two, and they nodded in agreement. With no objections, the court released the jury. There was no constructive amendment of the indictment. United States v. Holley, 23 F.3d 902, 912 (5th Cir.), cert. denied 115 S.Ct. 635 (1994), 115 S.Ct. 737 (1995).

There was no plain error in the Allen charge given to the jury. A court may give a charge to a jury to iron out their differences and reach a verdict, sometimes called an "Allen charge" after Allen v. United States, 164 U.S. 492 (1896). We review Allen charges to make sure (1) the semantic deviation from approved Allen charges is not so prejudicial as to require reversal, and (2) the circumstances surrounding the giving of an

approved Allen charge are not coercive. United States v. Heath, 970 F.2d 1397, 1406 (5th Cir. 1992), cert. denied, 507 U.S. 1004 (1993). The entire instruction given by Judge Kazen was substantially the same as the Fifth Circuit District Judges Association Pattern Jury Instructions (Criminal Cases) (1990), approved in United States v. Pace, 10 F.3d 1106, 1122 n. 15 (5th Cir. 1993), cert. denied, 114 S.Ct. 2180 (1994). The charge given to Severa's jury was even less coercive than the pattern instruction because the court emphasized (1) the jurors' not surrendering their positions, and (2) the fact that the court would not detain them if they found they were unable to agree. See United States v. Kimmel, 777 F.2d 290, 295 (5th Cir. 1985), cert. denied, 476 U.S. 1104 (1986).

Judgment AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 96-40032

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SHAWN ANTHONY SEVERA

Defendant - Appellant

Appeal from the
United States District Court
for the Southern District of Texas, Laredo

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 10/8/96, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FRAP and Local Rule

35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

REHG-6

U.S. COURT OF APPEALS
FILED
NOVEMBER 15, 1996
CHARLES R. FULBRUGE III
CLERK

UNITED STATES DISTRICT COURT
Southern District of Texas

UNITED STATES OF AMERICA

v.

SHAWN ANTHONY SEVERA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number 5:95CR00115-001

ROEL TREVINO
Defendant's Attorney

THE DEFENDANT:

[X] was found guilty on count(s) S2 on 8/25/95 after a plea of not guilty.

Title & Section	Nature of Offense
21 USC 841(b)(1)(B)	Possession w/int. to distribute a qty. in excess of 100 kgs., that is, 2,115.25 lbs., of marihuana

Date Offense Concluded	Count Number(s)
05-12-95	S2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) S3

[X] Count(s) 1-3, S1 are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 460-35-6836

Defendant's Date of Birth: 06/10/1969

Defendant's USM No.: 67688-079

Defendant's Residence Address:
20410 Telge Rd. #11, Tomball TX 77375

Defendant's Mailing Address:
20410 Telge Rd. #11, Tomball TX 77375

12/21/1995
Date of Imposition of Judgment

/s/ George P. Kazen
Signature of Judicial Officer

HONORABLE GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

12/22/95
Date

DEFENDANT: SHAWN ANTHONY SEVERA
CASE NUMBER: 5:95CR00115-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 132 month(s).

The defendant was advised of his right to appeal the sentence, including the right to appeal in forma pauperis upon proper documentation.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[X] as notified by the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

DEFENDANT: SHAWN ANTHONY SEVERA
CASE NUMBER: 5-95CR00115-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s) .

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: SHAWN ANTHONY SEVERA
CASE NUMBER: 5:95CR00115-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	**Fine**	**Restitution**
Totals:	$ 50.00	$1,500.00	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement..... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ 0.00 .

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows: _

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: SHAWN ANTHONY SEVERA
CASE NUMBER: 5:95CR00115-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [ ] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [X] in installments to commence 30 day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: SHAWN ANTHONY SEVERA
CASE NUMBER: 5:95CR00115-001

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

The court did not make a two level upward adjustment for 2D1.1(b)(1).

Guideline Range Determined by the Court:

Total Offense Level: 32
Criminal History Category: I
Imprisonment Range: 121 to 151 months
Supervised Release Range: 4 to 5 years

Fine Range: $17,500.00 to $2,000,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $_____

[X] The sentence is within the guideline range, that range exceeds 24 months, and the court finds no reason to depart from

the sentence called for by the application of guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA	§	
		CRIMINAL NO.
v.	§	L-95-115-S
SHAWN ANTHONY SEVERA	§	

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about May 12, 1995, in the Southern District of Texas and elsewhere and within the jurisdiction of the Court, **Defendant,**

SHAWN ANTHONY SEVERA,

did knowingly and intentionally conspire and agree with other persons known and unknown to the Grand Jurors to knowingly and intentionally possess with intent to distribute a Schedule I Controlled substance, to-wit: a quantity in excess of 100 kilograms of marihuana.

In violation of Title 21, United States Code, Sections 846, 841(a)(1) and 841(b)(1)(B).

COUNT TWO

On or about May 12, 1995, in the Southern District of Texas and elsewhere and within the jurisdiction of the Court, **Defendant,**

SHAWN ANTHONY SEVERA,

did knowingly and intentionally possess with intent to distribute a Schedule I controlled substance, to-wit: a quantity in excess of 100 kilograms, that is, 2,115.25 pounds (gross weight), of marihuana.

In Violation of Title 21, United States Code, Sections 841(a)(1), and 841(b)(1)(B) and Title 18, United States Code, Section 2.

COUNT THREE

On or about May 12, 1995, in the Southern District of Texas and within the jurisdiction of the Court, **Defendant, SHAWN ANTHONY SEVERA**, during and in relation to a drug-trafficking crime, namely possess with intent to distribute a Schedule I Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1), did knowingly carry a firearm, namely a Sig Saur, 9mm semi-automatic handgun, serial number U302 672. In violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL

/S/
FOREMAN OF THE GRAND JURY

GAYNELLE GRIFFIN JONES
United States Attorney

by /s/ Mary Lou Castillo
for YVONNE S. GONZALEZ
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

U.S. OF AMERICA *

VS. * CRIM. NO. L-95-115

SHAWN ANTHONY SEVERA *

VERDICT

On Count Two, We the Jury find the Defendant Shawn Anthony Severa

GUILTY CHARGE #2 TRANSPORTING MARIHUANA
("Guilty as Charged" or "Not Guilty")

CHARGE #3 NOT GUILTY

On Count Three, We the Jury find the Defendant Shawn Anthony Severa

NOT GUILTY
("Guilty as Charged" or "Not Guilty")

DATED: 08/25/95

\s\
FOREMAN

In this case the Trial Judge gave the following explanation to the jury:

THE COURT: LET ME SUGGEST THIS TO YOU, LADIES AND GENTLEMEN, AND LET ME EXPLAIN THIS TO YOU. AS I TOLD YOU, I DIDN'T NECESSARILY EXPECT IN A CASE LIKE THIS...AND, YOU KNOW, I DIDN'T NECESSARILY EXPECT IN A CASE LIKE THIS...AND, YOU KNOW, I HEAR A LOT OF THESE CASE. I DIDN'T NECESSARILY EXPECT IN A CASE LIKE THIS THAT YOU WOULD JUST GO IN AND IMMEDIATELY SAY, WE ALL AGREE. IF CASES WERE THAT SIMPLE, THEY PROBABLY WOULD NOT BE TRIED. THE THING ABOUT IT IS THAT A CASE LIKE THIS, AS YOU KNOW, AND AS YOU'VE HEARD, IS A VERY IMPORTANT CASE FOR BOTH SIDES. YOU PROBABLY ARE NOT EVEN AWARE OF ALL OF THE PRETRIAL EFFORT THAT HAS BEEN EXPENDED BY BOTH SIDES, AND YOU DID SEE PEOPLE COMING FROM OUT OF TOWN TO BE HERE, AND TIME AND EXPENSE HAS BEEN INVESTED IN THIS, OR AT LEAST ONE OF THE LAWYERS IS FROM OUT OF TOWN.

NOW, "A HUNG JURY" ESSENTIALLY MEANS THAT SOMEBODY IS GOING TO HAVE TO DO THIS ALL OVER AGAIN. IN OTHER WORDS, WE'RE GOING TO HAVE TO PICK ANOTHER JURY AND GO THROUGH THE WHOLE PROCESS ALL OVER AGAIN. AND THE NEW JURY WOULD BE JUST LIKE YOU FOLKS. IT WOULDN'T BE ANY...I DON'T THINK THEY'D BE ANY SMARTER, ANY MORE ASTUTE, ANY FAIRER, ANY MORE ATTENTIVE. WE'LL JUST HAVE TO DO IT ALL OVER AGAIN.

NOW, THE POINT I'M MAKING, AND I THINK I'M SPEAKING FOR BOTH SIDES, IS THAT WE DON'T WANT TO BE...WE DON'T WANT THAT TO BE THE FIRST OPTION, TO JUST SAY, WELL, YOU KNOW, THAT'S IT. AND I REALIZE IT'S

LATE AND I REALIZE YOU ALL ARE MAYBE A LITTLE TIRED OF THIS, BUT YOU DIDN'T REALLY GET OUT THERE TILL 4:00 O'CLOCK, AND I THINK THE BAILIFF CAME INTO ME ABOUT ...AND WE HAD TO FIND THE LAWYERS AND GET THEM OVER HERE. BUT HE CAME TO ME AT ABOUT 5:30. SO YOU'VE WORKED A LITTLE BIT, BUT I'M NOT SURE WE'VE EXHAUSTED THE POSSIBILITY OF TRYING TO RESOLVE THIS CASE.

NOW, PLEASE UNDERSTAND THAT I'M NOT ASKING EITHER SIDE...AND I CANNOT STRESS THIS STRONGLY ENOUGH. I CERTAINLY DO NOT WANT WHATEVER SIDE...EITHER SIDE TO JUST SAY, OKAY. I GIVE UP; THAT NOT THE POINT, BUT I DO WANT TO BE SURE WE'VE MADE EVERY EFFORT TO TRY TO BRING THIS CASE TO A CONCLUSION, EVERY REASONABLE EFFORT. I'M INCLINED, AND I THINK BOTH SIDES HAVE JOINED ME IN THIS, TO ASK YOU TO MAYBE JUST GO HOME AND REST AND SLEEP ON IT AND LET'S AT LEAST GIVE IT A TRY IN THE MORNING FOR A LITTLE WHILE. I WANT YOU TO UNDERSTAND THAT...AND THIS IS A DELICATE AREA FOR A JUDGE TO WORK WITH A JURY, BECAUSE I DON'T WANT YOU TO THINK THAT WE'RE JUST GOING TO LOCK UP HERE DAY IN AND DAY OUT UNTIL SOMEBODY SURRENDERS; THAT NOT THE POINT. IN OTHER WORDS, AT SOME POINT, IF NOBODY BUDGES, IF NOBODY CHANGES THEIR MIND, WHY, OF COURSE, WE WILL GIVE UP, AND WE HAVE DONE THAT ON OCCASION. I JUST DON'T WANT THAT TO BE THE FIRST OPTION, OF SAYING, WELL, WE'VE GIVEN IT A LITTLE BIT OF A WHIRL. LET'S GIVE UP. BECAUSE THERE'S A LOT OF RAMIFICATIONS TO THAT.

IN OTHER WORDS, AS I SAY, BOTH SIDES HAVE EXPENDED A LOT OF TIME, A LOT OF EFFORT, A LOT OF MONEY...AND I THINK IT

WAS A WELL-ARGUED CASE ON BOTH SIDES AND I THINK BOTH SIDES GAVE IT THEIR BEST SHOT. I CAN'T...I MEAN, I DON'T KNOW, 'CAUSE I DON'T INVESTIGATE THESE CASES. I JUST SEE IT HERE LIKE YOU DO. BUT I CAN'T SEE HOW EITHER SIDE IS GOING TO BE MUCH STRONGER OR BETTER THE NEXT TIME. AS I SAY, I DON'T THINK THE NEXT JURY IS GOING TO BE ANY BETTER THAN YOU FOLKS ARE. I THINK THAT WE WOULD ALL LIKE TO SAY THAT WE TRIED.

SO UNLESS THERE'S JUST A REALLY, REALLY STRENUOUS OBJECTION, WHAT I'D LIKE YOU TO DO IS JUST GO AND RELAX AND SLEEP OVER IT AND COME BACK IN THE MORNING AND I'LL GIVE YOU ANOTHER VERY, VERY BRIEF INSTRUCTION ALONG THIS CAME LINE AND THEN JUST ASK YOU TO TRY A LITTLE WHILE LONGER, REMEMBERING THAT, YOU KNOW, EVEN IF IT'S ELEVEN TO ONE... AND I DON'T KNOW WHAT THE COUNT IS AND I DON'T WANT TO KNOW WHAT THE COUNT IS. BUT EVEN IF IT'S ELEVEN TO ONE, ONE WAY OR THE OTHER, I DON'T WANT THAT ONE PERSON TO GIVE UP IF THAT'S YOUR HONEST OPINION. BUT I DO WANT TO BE SURE THAT WE'VE GIVEN IT THE BEST SHOW WE CAN.

NOW, THE INSTRUCTION THAT IS GIVEN AT THIS TIME, AND I'LL JUST READ IT TO YOU NOW, AND JUST LISTEN TO THIS AND THINK ABOUT THIS OVERNIGHT. IF A SUBSTANTIAL MAJORITY OF YOUR NUMBER ARE FOR A CONVICTION, EACH DISSENTING JUROR OUGHT TO CONSIDER WHETHER THE DOUBT IN YOUR OWN MIND IS A REASONABLE ONE, SINCE IT APPEARS TO MAKE NO EFFECTIVE IMPRESSION ON THE MINDS OF THE OTHERS. ON THE OTHER HAND, IF A MAJORITY OR EVEN A LESSER NUMBER OF YOU ARE FOR ACQUITTAL, THEN THE OTHER JURORS ALSO OUGHT TO ASK SERIOUSLY WHETHER THEY DO NOT HAVE A REASON TO DOUBT

THE CORRECTNESS OF THE JUDGMENT WHICH IS NOT SHARED BY SEVERAL OF THEIR FELLOW JURORS AND WHETHER THEY SHOULD DISTRUST THE WEIGHT AND SUFFICIENCY OF EVIDENCE WHICH HAS APPARENTLY FAILED TO CONVINCE AT LEAST SEVERAL OF THE FELLOW JURORS BEYOND A REASONABLE DOUBT.

NOW, REMEMBER AGAIN THAT...AND I'M NOT ASKING ANYBODY TO SACRIFICE YOUR HONEST CONVICTION. BUT REMEMBER THAT AFTER FULL DELIBERATION AND CONSIDERATION, IT IS YOUR DUTY TO TRY TO REACH A VERDICT, IF YOU CAN, WITHOUT SURRENDERING YOUR CONSCIENCE. AND REMEMBER, OF COURSE, AGAIN, THAT IN THE END, IT IS THE GOVERNMENT'S BURDEN TO PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT. AND I'M NOT TAKING AWAY FROM THAT BURDEN EITHER. THAT IS THE GOVERNMENT'S BURDEN, AND IF THE GOVERNMENT HAS FAILED TO DO THAT, THEN YOU MUST ACQUIT HIM. SO I WOULD APPRECIATED IT IF YOU WOULD GIVE IT ONE MORE TRY IN THE MORNING.

AND AS I SAY, MR. FOREMAN, IF, AFTER A WHILE, IN THE MORNING IT... YOU KNOW, I'LL LEAVE IT TO YOUR GOOD JUDGMENT. IF, AFTER A WHILE, IT LOOKS LIKE NOTHING IS CHANGING AT ALL AND PEOPLE ARE JUST ENTRENCHED IN THEIR POSITION, I'M NOT GOING TO KEEP YOU HERE ALL DAY LONG JUST FOR TORTURE OR SOMETHING. I'M NOT GOING TO DO THAT, BUT I WOULD LIKE...IF WE'RE GOING TO HAVE A HUNG JURY AND A MISTRIAL AND DO THIS AGAIN, I WOULD LIKE AT LEAST TO KNOW THAT WE GAVE IT OUR VERY BEST SHOT.

SO, UNLESS THERE'S A PASSIONATE OBJECTION TO THAT, I WOULD LIKE TO ASK YOU TO COME BACK AT...YOU CAN COME BACK ABOUT

TEN MINUTES TO 9:00. IN FACT, WE'LL JUST GATHER HERE AND...AS SOON AS WE FIND OUT THAT ALL OF YOU ARE HERE, WE'LL JUST TURN YOU LOOSE. THERE'S NOTHING ELSE FOR US TO DO. THERE'S NOTHING ELSE FOR US TO DO, PRESENT EVIDENCE OR ANYTHING ELSE. WE'LL JUST TURN YOU ALL BACK IN THERE AND...AND AT LEAST SEE IF, AFTER THINKING ABOUT IT OVERNIGHT, ANYTHING HAS CHANGED, MR. FOREMAN. AND IF IT LOOKS LIKE THERE'S SOME MOVEMENT ONE WAY OF THE OTHER, FINE; IF AFTER A WHILE, NOTHING HAS CHANGED AND EVERYBODY'S OPINIONS ARE THE SAME AND IT LOOKS LIKE IT'S NOTHING, WELL, THEN JUST SEND A MESSAGE TO ME AN THAT'LL BE THE END OF IT.

NOW, I ASSURE YOU I WILL NOT KEEP YOU HERE JUST TO PRESSURE ONE SIDE OR THE OTHER TO GIVE UP, THAT'S NOT WHAT I'M TRYING TO DO, BUT I WOULD LIKE TO BE SURE THAT WE'VE MADE OUT BEST EFFORT. OKAY? SO IF YOU ALL WOULD PLEASE...IF YOU'D JUST INDULGE US IN THAT AND LET'S GATHER IN THE MORNING AND...AND THINK ABOUT IT TONIGHT, THINK ABOUT THE WHOLE CASE. DON'T TALK TO ANYBODY, THOUGH, AND DON'T LET ANYBODY TALK TO YOU. JUST THINK ABOUT IT AND WHEN YOU COME IN IN THE MORNING, MAYBE HAVE ONE MORE GO ROUND OF OPINIONS, AND IF EVERYBODY'S OPINION IS THE SAME, WHY, SO BE IT. AND WE'LL PAY YOU FOR THE DAY, FOR COMING IN. BUT AT LEAST WE'LL SAY THAT WE TRIED. OKAY? ALL RIGHT. WELL, WE'LL SEE YOU HERE ABOUT TEN MINUTES TO 9:00 IN THE MORNING THEN. (Tr. Trans. p. 558, l. 8 - p. 563, l. 13)

BEST AVAILABLE COPY